**Fair Political Practices Commission**
**MEMORANDUM**

**To:** Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

**From:** Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

**Subject:** The Supreme Court's Recent "BCRA" Decision, *McConnell, United States Senator, et al. v. Federal Election Commission, et al.*

**Date:** January 26, 2004

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## Executive Summary

On December 10, 2003, the United States Supreme Court released its long-anticipated opinion on a welter of legal challenges to the newly enacted Bipartisan Campaign Reform Act of 2002 ("BCRA"), a major amendment to the Federal Election Campaign Act of 1971 ("FECA"). This sweeping and controversial overhaul of the FECA was motivated by Congress' perception that the conduct of federal campaigns had evolved in a way that effectively nullified many of the fundamental rules that had governed federal campaigns over the past three decades.[1]

The *McConnell* decision adjudicated the constitutionality of amendments to *federal* statutes, but the opinion does have implications for the Political Reform Act (the "Act"). Many of the campaign practices found to have frustrated regulation of federal campaigns are employed in California also, and the governmental interests and constitutional constraints on governmental regulation are essentially the same in state and federal elections. *Buckley v. Valeo*, 96 S.Ct. 612 (1976), has long served both the federal and state governments as the ultimate resource for identifying significant state interests in regulating election campaigns, and accommodating those interests to constitutional guarantees of free speech and association. Because it effectively "updates" *Buckley* by evaluating a comprehensive regulatory response to modern campaign practices, the *McConnell* decision supplements *Buckley*, and in some areas may replace it as the constitutional "compass" for this Commission, the courts, and the Legislature.

This memorandum will show that the majority opinion is a frequently complex and sometimes incomplete treatment of a large number of statutory and constitutional questions, some of which are peculiar to federal campaigns, while others will have broader implications. Lower courts are just beginning to react to the *McConnell* opinion, and debate among the courts of appeal will do much to clarify the ultimate legal "meaning" of *McConnell*. It appears at this

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[1] At 298 pages (including a 19 page summary) in the version available on the Supreme Court's website, *McConnell, United States Senator, et al. v. Federal Election Commission, et al.*, 124 S.Ct. 619 (2003) may well be the longest Supreme Court opinion on record. The case reached the Supreme Court on appeal from the decision of a three-judge court empaneled as specially provided under BCRA, which also stipulated an expedited review by the Supreme Court. The opinion of the court below; *McConnell, et al. v. FEC, et al*, 251 F.Supp. 2d 176 (D.D.C. 2003) totals 775 pages in the official reporter. The full text of BCRA is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h2356enr.txt.pdf.

stage that nothing in the majority opinion casts doubt on the validity of any provision of the Act, or requires amendment of any regulation. The opinion does suggest the possibility of legislation introducing new and different provisions into the Act. But the local significance of *McConnell* is that of a blueprint for the future; its effect on the Act will not be immediate.

## Introduction

No full summary of this decision can be much more succinct than the court's own syllabus, which consumes nearly twenty pages in cataloguing the major points and counterpoints of every majority and dissenting opinion. But because a "high-resolution" study of the decision would require detailed discussion of federal statutes that would do little to highlight the implications of this decision for the Act, staff will take a broader approach. This memorandum begins with a survey of evolving campaign activities that Congress wished to regulate, followed by an outline of the means adopted by Congress to further its goals. The next section outlines the reasoning adopted by the court's majority to uphold the new rules against constitutional attack. The memorandum concludes with a few reflections on matters that may be of special interest to the Commission, including the following points:

*Contribution Limits*

Under *Buckley*, the legal sufficiency of contribution limits was established when it was shown that they were closely drawn to serve a sufficiently important governmental interest. As a practical matter, the constitutionality of contribution limits is now well settled, and a successful challenge to a contribution limit must be based on a claim that the limit in question is set too low, such that it prevents candidates from mounting effective campaigns. The *McConnell* decision does not break new ground here, and the legal sufficiency of the contribution limits enacted by Proposition 34 are not called into question by this decision.

*Expenditure Limits*

Although the *Buckley* court evaluated contribution limits under a relatively relaxed standard of review, the court applied a more demanding "strict scrutiny" standard to limits on *expenditures*. "Strict scrutiny" requires a "compelling" state interest and a showing that the expenditure limit is "narrowly tailored" to further that compelling interest. The expenditure limits before the *Buckley* court were struck down, and few such limits have survived scrutiny in the years since. The *McConnell* majority preserves the formal distinction between limits on contributions and expenditures, but applies the lower standard of review appropriate to contribution limits to uphold restrictions on "expenditures," in cases where contribution limits could have been employed to achieve the same outcome. But the *McConnell* court was addressing BCRA amendments that have no counterpart in the Act, and this section of the opinion should have no impact on the Act as presently written.

*Disclosure Requirements*

The Supreme Court in the past has generally treated disclosure requirements as a lesser intrusion on speech and associational rights that would be upheld under a relaxed standard of review. However, the speech subject to disclosure requirements has been interpreted narrowly, to reach only communications amounting to "express advocacy," words urging action for or against a clearly identified candidate. *McConnell* makes clear that the Supreme Court never intended to suggest that the Constitution prohibited regulation of any and all campaign speech that did not contain "express advocacy." Using this reasoning, the court upheld federal restrictions on "electioneering communications" that did *not* contain "express advocacy." The statutes administered by the Commission, however, in almost all cases regulate only communications containing "express advocacy." Thus the Supreme Court's more liberal view of state regulatory authority would affect the Act only if it were amended to extend disclosure requirements to communications which are not now subject to regulation. One provision added by Proposition 34 (§ 85310) requires disclosure of certain advertisements which do not include express advocacy, and its broader reach is no longer constitutionally suspect after *McConnell*.

*Soft Money*

In one of its major innovations, BCRA regulates the use of "soft money," unlimited contributions to political party committees that might fund campaign activities not subject to requirements that the source or amount of contributions be disclosed. The Act does not contain similar "soft money" restrictions, and the Supreme Court's approval of such restrictions therefore will have no immediate impact on the Act.

*Miscellaneous Provisions*

BCRA has many implications for campaign finance law scattered throughout the majority opinion in discussions on topics as diverse as the FECA's ban on contributions from minors, or the requirement that executory contracts for campaign ads be disclosed as expenditures the day the contract is signed. In the pages that follow, staff will offer a summary of all major issues decided by the *McConnell* majority, and in the future will present "updates" as this complex and controversial decision, or lower court interpretations, raise matters of immediate interest.

## A. The *McConnell* Decision in Context

### 1. *Developments that gave rise to the Bipartisan Campaign Reform Act of 2002*

In deciding the first large-scale challenge to the FECA, *Buckley* recognized in 1976 that modern campaign speech was closely tied to the money needed to broadcast that speech to the electorate. Limits on the amount that could be spent on campaign speech ("expenditure limits") were regarded as direct restrictions on core political speech, such that the constitutionality of expenditure limits would be determined under a "strict scrutiny" standard of review. Strict

scrutiny requires that the government establish a "compelling" state interest in regulating the speech at issue, and also demonstrate that the restriction is "narrowly tailored" to vindicate that interest at the lowest feasible cost to free speech rights.[2]

The FECA also contained limits on the amount of money that could be contributed to persons who would use that money for political speech,[3] and the *Buckley* court evaluated such "contribution limits" more leniently than expenditure limits because it found that contribution limits were not direct restrictions on core speech, but amounted instead to a less onerous, indirect burden on the speech and association rights of contributor and recipient. The legal sufficiency of contribution limits was therefore decided under a lower standard of review; the government must show that the limit is "closely drawn" to serve a "sufficiently important interest."[4] The court agreed that large campaign contributions had the potential to corrupt their recipients, or to create the appearance of such corruption, either of which was a sufficient state interest under the more "relaxed" standard of review applied to contribution limits.

Finally, the FECA originally required that persons engaged in campaign speech disclose the sources and amounts of contributions used to fund their speech, with a few exceptions. Because the statute before the *Buckley* court offered only vague guidelines for identifying campaign speech subject to this disclosure requirement, the court upheld the provision by interpreting the meaning of the statute narrowly, to reach only communications amounting to "express advocacy," including such imperatives as "vote for," "vote against," "support," etc., urging action for or against a clearly identified candidate. Otherwise, recognizing an important state interest in an informed electorate, the court treated disclosure requirements like contribution limits, as a lesser intrusion on speech and associational rights that would be upheld under a relatively relaxed standard of review.

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[2] The Supreme Court and lower tribunals have not established a uniform terminology for "standards of review" in First Amendment cases, and this critical subject is vastly complex and confused as a result. The discussion in this memorandum is simplified, employing the terminology most frequently seen, and the meanings most frequently assigned to the terms mentioned, with little of the nuance customary in more extended discussions.

[3] These limits applied to political parties as well as to candidates, with the major proviso that there was no limit on contributions to political parties where the contributions would be used to fund "party building" and similar non-campaign speech. And, unlike California law, the FECA contains an outright ban on contributions made directly from the treasuries of corporations and labor unions, which however are permitted under the federal law to establish segregated funds (now generally known as "political action committees") to make such contributions.

[4] "Closely drawn," in the court's parlance, is a requirement parallel to, but more forgiving than, the "narrowly tailored" element of "strict scrutiny." The standard of review for disclosure rules is like that for contribution limits, or possibly a bit looser – imprecisions in language make direct comparisons difficult. See the following text, and Note 10 below quoting Chief Justice Rehnquist on a BCRA disclosure requirement, where the court found "a sufficient relationship" to "an important governmental interest." The significance of differing standards of judicial review is reflected in this fact: after *Buckley*, expenditure limits have been enacted in very few jurisdictions, and they have survived judicial scrutiny only in extraordinary circumstances. Contribution limits, by contrast, are now an established part of the regulatory landscape across the country.

The most important and persistent legacies of *Buckley* are: (1) the evaluation of campaign finance regulations under varying standards of review, (2) the recognition that corruption, the appearance of corruption, and an electorate informed on the funding sources of campaign speech, are state interests of great importance, and (3) a rigid distinction between "express advocacy" and "issue advocacy."[5]

Over the years, the FECA and federal case law grew along lines suggested by *Buckley*, while the regulated community adapted itself to a regime of contribution limits and disclosure requirements. A series of developments in the 1990's, involving both a loosening of federal regulations[6] and more "sophisticated" campaign practices, led to a perception in some quarters that the FECA no longer provided an effective regulatory mechanism. After the 1996 campaign season, this perception became more widespread.

Ultimately, as described in the majority opinion, the Senate commissioned a committee investigation into the 1996 elections, which resulted in a 1998 report detailing at length the evolution of campaign practices that skirted many of the FECA's most fundamental rules. The Senate committee found that federal candidates had become active in soliciting contributions not only to their own campaigns, under a limit of $1,000 per election, but to political party committees for uses ostensibly not including attempts to influence the outcome of federal elections. Yet this money was increasingly used to fund "issue ads" promoting federal candidates, or attacking their opponents: by avoiding "express advocacy," these communications could be used to extend candidate campaigns to areas technically exempt from candidate contribution limits and disclosure requirements.

This practice had already grown sufficiently routine that pundits had developed a new terminology distinguishing "hard money" – direct contributions to candidates, subject to contribution limits and disclosure requirements – from "soft money" – unlimited contributions to political party committees that might fund campaign advertisements, not subject to requirements that the source or amounts of contributions be disclosed. Committees unaffiliated with political parties had also turned to "issue ads" to support or oppose their candidates of choice, to avoid disclosure "burdens" that the *Buckley* court had found to be a justifiable necessity.

In short, the Senate committee found that the provisions lying at the heart of the FECA, its contribution limits and disclosure requirements, had been rendered largely non-functional.

**2. *Congress' regulatory response***

[5] "Issue advocacy" is a term that has grown up to mean all speech not classified as "express advocacy." It has often been thought to lie beyond the reach of governmental regulation.

[6] The "loosening of federal regulations" was due in part to rulings by the FEC itself, and in part to a conservative body of case law emerging from a number of federal circuits.

The principal amendments introduced by BCRA reflect Congress' concerns about the increasing use of "soft money" and "issue ads" to influence federal election campaigns while avoiding the FECA's contribution and disclosure provisions.[7] Title I, centered on § 323 of the FECA, regulates the solicitation, accumulation, or expenditure of soft money.

### *A. Soft Money*

A new § 323(a) prohibits national party committees and their agents from soliciting, receiving, directing, or spending "soft money." New § 323(b) prohibits contributions (not subject to the FECA's contribution limits) to committees of state or local political parties, that would be used to fund "federal election activities," defined to include voter registration drives within 120 days of a federal election, as well as voter identification, "get out the vote" drives, or generic campaign activities, and public communications supporting or opposing a clearly identified federal candidate. These activities must now be funded with "hard," rather than "soft," money.

New § 323(d) prohibits national, state, and local party committees from making or soliciting any contribution to organizations exempt from taxes under Internal Revenue Code §§ 501(c) and 527. Finally, new § 323(f) prohibits state or local candidates from spending soft money on communications that support or oppose a clearly identified federal candidate.

### *B. Electioneering Communications*

Title II, entitled "Noncandidate Campaign Expenditures," confronts the problem of sham "issue ads." The first subtitle (of two) treats "Electioneering Communications." This subtitle amends FECA §§ 304 et seq., which require political committees to file periodic disclosure reports with the FEC. This subtitle introduces the term "electioneering communication" to describe communications that henceforth will be subject to disclosure requirements and other restrictions.

Communications subject to the FECA's requirements are no longer limited to messages featuring "express advocacy," but include any broadcast, cable or satellite communication referring to a clearly identified candidate, made within 30 or 60 days prior to specified federal elections, which is targeted to a defined "relevant electorate." Additional sub-provisions treat communications coordinated with a political party or candidate as contributions to the party or candidate, and prohibit corporations, nonprofit organizations, and labor unions from financing such communications from general treasury funds.

### *C. Stricter Party Coordination Rules*

[7] This survey does not purport to describe the entirety of BCRA but, like the memorandum generally, is focused on the provisions giving rise to constitutional questions of importance to the Commission.

The second subtitle of Title II extends existing rules regarding expenditures coordinated with candidates to expenditures coordinated with "a national, state, or local committee of a political party." Under these amendments, expenditures coordinated with such committees are now considered contributions to those committees, subject to the FECA's source and amount limitations. Further, the new statute expressly provides that "regulations shall not require agreement or formal collaboration to establish coordination."

***D. Various: Contributions by Minors, Disclosure of Executory Contracts and Broadcast Data***

Titles III and IV present miscellaneous amendments to the FECA and to the Federal Communications Act of 1934, which are ancillary to the sweeping provisions of Titles I and II. These measures were upheld, with one exception, in an opinion by Chief Justice Rehnquist, and they will not be discussed in this memorandum, apart from the following observations.[8]

The court invalidated a prohibition on contributions by minors,[9] and upheld amendments to FECA § 318, which already required that certain communications authorized by a candidate clearly identify the candidate or, if not so authorized, identify the payor and announce the lack of authorization. BCRA expanded that existing disclosure requirement to include disbursements for "electioneering communications."[10] The remainder of the challenges decided in Chief Justice Rehnquist's opinion were rejected on standing grounds and present no issues of immediate concern to this Commission.

Justice Breyer delivered the opinion of the court on a Title V amendment to the Federal Communications Act of 1934 requiring that broadcast licensees keep records of broadcast requests made by or on behalf of federal candidates, or by others who wished to place messages referring to federal candidates, and of requests by any person to broadcast messages related to legislative or political matters "of national importance." The court found that these provisions were not unduly burdensome, and that they served legitimate purposes, insuring that broadcasters comply with such existing legal obligations as the "equal time" and "lowest unit charge" rules applicable to political communications, or the new "electioneering communications" rules.

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[8] The Chief Justice dissented from the majority's opinion on Titles I and II, but wrote for the court on these Titles.

[9] The court found this ban insufficiently tailored to the government's asserted interest in preventing circumvention of valid contribution limits by the use of minors as conduits for contributions from adults. By contrast, the Act's rule at § 85308, entitled "Family Contributions," is more narrowly tailored than the federal provision insofar as it does not *ban* contributions by children, but merely presumes that such contributions are directed and controlled by the parent or guardian, so that contributions made by the minor are aggregated with those made by the parent or guardian.

[10] Constrained by the majority's approval of "electioneering communications," Justice Rehnquist concluded: "We think BCRA § 311's inclusion of electioneering communications in the FECA § 318 disclosure regime bears a sufficient relationship to the important governmental interest of 'shedding the light of publicity' on campaign financing." (*McConnell, supra*, 124 S.Ct. at 710.)

## B. The Majority Opinion on Titles I and II

It is important to bear in mind that the *McConnell* "opinion" actually consists of three separate opinions delivering the judgment of a shifting majority of the court on each of the numerous challenges to BCRA. These three majority opinions resolved all claims against provisions contained in Titles I and II, Titles III and IV, and Title V, respectively. In addition to the three majority opinions, Justices Kennedy, Scalia, Thomas, and Chief Justice Rehnquist wrote separately in dissent to the majority opinion on Titles I and II. Just as these titles are the "heart" of BCRA, so too the "heart" of the Supreme Court's opinion is to be found in its majority opinion, co-authored by Justices Stevens and O'Connor, on Titles I and II. Justices Ginsburg, Souter and Breyer joined in all parts of this majority opinion, making up a total of five justices upholding BCRA's critical provisions.

The Chief Justice, with his three colleagues in the minority, disagreed vigorously with the majority opinion, a notable departure from the single voice speaking for the court in *Buckley*. It appears that the majority had been deeply impressed by the government's evidence on the extent to which longstanding federal election rules had been circumvented by recent developments in the conduct of federal campaigns. The many plaintiffs who had challenged the new rules did not seriously attempt to refute the core of the government's evidentiary case, but argued instead that the First Amendment protected such conduct absolutely. The subject matter of Titles I and II does much to explain the deep division seen in the court. At a fundamental level, the questions were presented as a referendum on Justice Jackson's famous caution on reading the Bill of Rights as a suicide pact.[11]

After a brief review of historical developments leading up to the 1974 amendments to the FECA, the majority summarized the *Buckley* court's action on those provisions as follows:

> "We therefore held that Congress' interest in preventing real or apparent corruption was inadequate to justify the heavy burdens on the freedoms of expression and association that the expenditure limits imposed.
>
> We upheld all of the disclosure and reporting requirements in the Act that were challenged on appeal to this Court after finding that they vindicated three important interests: providing the electorate with relevant information about the candidates and their supporters; deterring actual corruption and discouraging the use of money for improper purposes; and facilitating enforcement of the prohibitions of the Act. (Cit om.) In order to avoid an overbreadth problem, however… we construed the reporting requirement for persons making expenditures of more than $100 a year 'to reach only funds used for communications that expressly advocate the election or

[11] *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949): "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact**."**

> defeat of a clearly identified candidate'. (124 S.Ct. at 647-648)"[12]

The majority went on to review campaign developments over the years since *Buckley*, concentrating largely on the 1998 Senate committee report (actually consisting of two reports, since the majority and minority parties on the committee wrote separately). The court observed of these reports:

> "They agreed that the 'soft money loophole' had led to a 'meltdown' of the campaign finance system that had been intended 'to keep corporate, union and large individual contributions from influencing the electoral process.' One Senator stated that 'the hearings provided overwhelming evidence that the twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of rubble." (*Id*. at 652, footnotes omitted.)

Taking this state of affairs as established, the majority proceeded to review the remedies proposed by Titles I and II.

**1**. ***Title I: Soft Money***

The court began with amendments to FECA § 323, which it described in the following terms. New subdivision (a) "prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money." Subdivision (b) "prevents the wholesale shift of soft-money influence from national to state party committees by prohibiting state and local party committees from using such funds for activities that affect federal elections." Subdivision (d) "reinforces these soft-money restrictions by prohibiting political parties from soliciting and donating funds to tax-exempt organizations that engage in electioneering activities." Subdivision (e) "restricts federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and limits their ability to do so in connection with state and local elections." "Finally, new FECA § 323(f) prevents circumvention of the restrictions on national, state, and local party committees by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates." (*Id*. at 654-655.)

Plaintiffs had urged the court to apply its "strict scrutiny" standard in reviewing these provisions, on the ground that they contained not only contribution, but expenditure limits. The majority declined to apply that rigorous standard: "But for purposes of determining the level of

[12] The different outcomes as between expenditure limits on the one hand, and contribution limits and disclosure requirements on the other, is the result of the more stringent standard of review applied to expenditure limits, as noted earlier. The same state interests (in preventing corruption of public officials and/or circumvention of anti-corruption provisions) are generally asserted in support of both expenditure and contribution limits.

scrutiny, it is irrelevant that Congress chose in § 323 to regulate contributions on the demand rather than on the supply side. (Cit. om.) The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not." (*Id*. at 657-658.)

In other words, because Congress restricted only the spending or solicitation of money that could not lawfully be contributed under the new measures, the court would review all of these statutes as contribution limits. In the majority's view, § 323 survived scrutiny under the relaxed standard of review appropriate to contribution limits.

The majority regarded the effect of these provisions as little more than a return to the regulatory regime approved in *Buckley* only to be subverted years later (*Id*. at 660, 674), and found that the record fully established the need of such measures to curb both corruption and the appearance of corruption.

The "appearance of corruption," based on relationships between political parties and officeholders, played a significant role in the majority's support for many provisions: "As the record demonstrates, it is the close relationship between federal officeholders and the national parties, as well as the means by which the parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect."[13] (*Id*. at 667.) Similarly, the majority regarded the new bans on soft-money contributions as "anti-circumvention" measures because of the relationship between national and state party committees, whereby the state committees functioned as an alternate avenue for spending on "federal electioneering activities." (*Id*. at 672.) Although this term is defined broadly under BCRA, the majority found that because state-party "registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." (*Id*. at 675.)

Section 323(d)'s ban on the solicitation of contributions to tax exempt organizations engaged in political activities was also regarded as a necessary measure to prevent circumvention of contribution limits: "The history of Congress' efforts at campaign finance reform well demonstrates that 'candidates, donors, and parties test the limits of the current law.' (Cit. om.) Absent the solicitation provision, national, state, and local party committees would have significant incentives to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates." (*Id*. at 678.) However, the court found that this prohibition "does raise overbreadth concerns" since it could be read to bar contributions from funds already raised in compliance with federal source, amount and disclosure provisions which already protect the government's legitimate interests. Rather than invalidate the rule, the court imposed a "narrowing construction" on § 323(d), construing it to apply only to funds *not* raised in compliance with FECA's source, amount and disclosure

[13] The parties "traded" on their relationships with candidates chiefly by offering large soft money donors "access" to high-ranking officeholders. (*Ibid*.)

provisions. (*Id*. at 681.)

Section 323(f) generally prohibits state or local candidates or officeholders from spending soft money to fund "public communications," defined as a communication that refers to a clearly identified federal candidate, which supports or opposes a candidate for that office. The majority found that this restriction does not cap the amount that state or local candidates may spend on any activity, but limits the source and amount of contributions from which they may fund expenditures that directly affect federal elections. It is, accordingly, a contribution limit, justified by the record of proliferating "sham issue ads" that fueled the soft-money explosion. Exceptions built into the statute sufficiently tailor it to withstand the level of scrutiny appropriate to a contribution limit. (*Id*. at 684.)

The majority rejected arguments that Title I violated the Tenth Amendment by usurping the states' authority to regulate their own elections, observing that Title I regulates only the conduct of private parties, and does not expressly preempt state legislation. Equal protection claims, alleging that Title I discriminates against political parties in favor of "special interest groups" fared no better. The majority felt that "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation," and closed with the observation that "[p]olitical parties have influence and power in the legislature that vastly exceeds that of any interest group." (*Id*. at 686.)

**2. *Title II: Electioneering Communications***

Title II amends FECA § 304, which contains the FECA's reporting requirements for political committees. BCRA substantially broadens federal disclosure requirements by attaching the obligations to a broader class of campaign advocacy, now defined by the term "electioneering communication." Prior to BCRA, federal disclosure provisions applied only to communications including "express advocacy," a limiting construction imposed by the *Buckley* court to resolve the vagueness of the federal statute's language, which required disclosure of expenditures "*relative to* a clearly identified candidate." Because the *Buckley* court believed that not all activities "relative to" clearly identified candidates might be subject to regulation, it looked to the language of the statute for some limiting principle, but found no clear guidance. The court provided that guidance by construing the statute as applicable only to communications featuring "express advocacy," a term that could be defined in a way that eliminated (or so it was thought) any unconstitutional vagueness.

BCRA's definition of "electioneering communication" brings within the scope of federal regulation a great deal of broadcast campaign advocacy that does not rely on "express advocacy" to carry the message, while it effectively addresses potential "vagueness" claims by specifying the circumstances under which any communication will be regulated as an "electioneering communication." The term is defined as any "broadcast, cable, or satellite communication" that:

> "(I) refers to a clearly identified candidate for Federal office:

> (II) is made within –
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." (2 U.S. C. A. § 434(f)(3)(A)(i).)

Additional definitions clarify crucial expressions such as "clearly identified candidate," and "targeted to the relevant electorate."[14] BCRA not only requires disclosure of the source and amount of contributions or expenditures made to fund "electioneering communications;" the funding of such communications by corporations and labor unions is also restricted.

The drafters of BCRA seem to have left little room here for the assertion of "vagueness" claims, which must be founded on a contention that it would be difficult to determine whether a given message amounted to an "electioneering communication."[15] As a result, challenges to federal regulation of electioneering communications centered on "the major premise… that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." (*Id*. at 687.) Notwithstanding reasonably clear contrary indications in *Buckley* and elsewhere that such a contention misconstrued *Buckley*, this argument has enjoyed some success in recent years in a number of courts. The majority flatly rejected it, and only Justice Thomas disagreed.[16]

The majority went on to note "that the unmistakable lesson from the record in this

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[14] Under the Act, "clearly identified" candidate is defined at regulation 18225(b)(1), in the context of communications that result from an "expenditure." The federal definition appears at 2 U.S.C. § 431(18), with similar language in the same context:

> "(18) The term 'clearly identified' means that--
> (A) the name of the candidate involved appears;
> (B) a photograph or drawing of the candidate appears; or
> (C) the identity of the candidate is apparent by unambiguous reference."

[15] On its face, the federal definition of "clearly identified" does raise many of the same questions highlighted in staff's recent memorandum (dated December 29, 2003), regarding the language of regulation 18225(b)(1). It might prove fruitful to incorporate federal advisories on 2 U.S.C. § 431(18) into the Commission's deliberations on the meaning of "clearly identified" throughout the Act.

[16] At a later point in the majority opinion, the court observed that plaintiffs did not contest the government's compelling interest in regulating express advocacy, *and* that plaintiffs did not contend that the speech involved in "so-called issue advocacy" is any more core political speech than are words of express advocacy. (*Id.* at 696.) The majority thus made it clear that "issue advocacy" directed at an upcoming election does not have a higher claim on the Constitution than do advertisements expressly advocating particular votes, so that a state interest in regulating express advocacy will support regulations addressing other forms of "advocacy," so long as problems of vagueness and overbreadth can be overcome. (See also Note 88 to the majority opinion.)

litigation, as all three judges on the District Court agreed, is that *Buckley's* magic words requirement is functionally meaningless" (*Id*. at 689), and concluded that "although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." (*Ibid.*) Thus the majority found that the term "electioneering communication" targeted messages plainly intended to influence the outcome of federal elections, without unconstitutional vagueness.[17] The majority reasserted the "important state interests that prompted the Buckley Court to uphold FECA's disclosure requirements," including one interest heretofore little discussed – the interest in "gathering the data necessary to enforce more substantive electioneering restrictions" (*Id*. at 690) – and agreed with the District Court's observation that:

> "Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." (*Ibid*.)

The majority also reaffirmed earlier decisions recognizing that compelled disclosure of donor identities might at times impose an unconstitutional burden on freedom to associate in support of unpopular causes, but the majority noted that plaintiffs seeking refuge in the Constitution from risks associated with advocacy of an unpopular cause have always been required to show a "reasonable probability" of harm to a group or its members. Plaintiffs in the present case had failed to make such a showing, and their "facial" challenge to BCRA's disclosure provisions was accordingly rejected, without foreclosing the possibility of future challenges in more appropriate cases. (*Id*. at 692.)

The majority *reversed* the lower court's judgment invalidating new FECA § 304(f)(5), a provision requiring early disclosure of "executory contracts" for expenditures on electioneering communications.[18] The majority rejected as "speculation" the district court's concern about the

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[17] The record before the court did not suggest that *all* communications meeting the definition of "electioneering communications" were necessarily intended to influence a federal election. In fact the evidence, reviewed at length in the district court opinion, indicated that a substantial minority of communications classifiable as "electioneering communications" were "pure" issue advocacy. With little discussion, the majority upheld restrictions that could well burden *some* messages published prior to an election whose outcome they were *not* intended to affect. But the majority said that: "Even if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not justify prohibiting all enforcement of the law unless its application to protected speech is substantial, not only in an absolute sense but also relative to the scope of the law's plainly legitimate applications." (*Id*. at 697, internal quotation marks, citation omitted.) Thus the court seems to have left the road open for "as applied" challenges which, as noted below, has already been recognized.

[18] An "executory contract" is a binding agreement whose terms have not yet been fully performed. Thus a signed contract to air a commercial advertisement in the near future may provide for payment after the commercial is aired – and thus neither party has fully performed its obligations at the time the contract is signed. The advertisement has not yet run, and the ad sponsor has not yet paid. But under the new federal statute, the expenditure on the ad is reportable on the day the contract is signed. The Commission's "paid spokesperson" rule, regulation 18450.11, has

confusion that might attend disclosure of information on contracts that *might* never be performed, and rejected as well claims that providing information on advertisements before their release could cause injury by telegraphing tactical information to opponents. The majority upheld this rule as an "anti circumvention" measure, to prevent exploitation of the "loophole" in disclosure provisions that would result from contracts for election-eve advertisements that required payment only *after* election day. (*Id*. at 692-693.)

One final point is worthy of note in this initial review of the majority decision. It has long been settled that expenditures by a noncandidate that are controlled by or coordinated with a candidate may be treated as contributions to the candidate. BCRA introduced a new provision that extends this rule to expenditures coordinated with a national, state or local committee of a political party, and expressly bars the FEC from adopting regulations that require an agreement or formal collaboration to establish coordination. At issue here is whether an agreement is necessary to mark the boundary between coordinated and "independent" expenditures. The majority noted that Congress has always treated expenditures made "at the request or suggestion of" a candidate as "coordinated" with that candidate, without requiring formal agreement with an accommodating supporter who makes an expenditure in response to the request or suggestion of the candidate. Language that had gone unchallenged (when applied to coordination with candidates) for nearly three decades, now applied to coordination with political party committees, was not shown to be unconstitutional by the largely speculative concerns voiced by plaintiffs. (*Id*. at 704-705.)

The majority opinion concluded with a telling reflection: "to say that Congress is without power to pass appropriate legislation to safeguard… an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. (*Id*. at 706.) This echo of Justice Jackson's remark, quoted at the beginning of this memorandum, suggests that the majority was self-consciously staking out a pragmatic position, reacting against "First Amendment absolutists" who have in the past flatly rejected legislative attempts to regulate even patent abuses of the electoral system on the theory that the First Amendment permits redress only through the "marketplace of ideas."[19]

### C. Implications for the Political Reform Act

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the same effect as this new federal provision, inasmuch as it also requires disclosure of executory contracts.

[19] These terms are descriptive, rather than pejorative. Against the majority's consistent reference to the evidence of campaign abuses, contrast the opening sentence of Justice Kennedy's dissenting opinion (the principal dissent on Titles I and II): "The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide for themselves which entities to trust as reliable speakers." (*Id*. at 742.) Consistent with this "market" approach, all of the dissenting justices (apart from Justice Thomas) *join* the majority in supporting virtually all of BCRA's disclosure provisions. The court is therefore all but unanimous on the importance of governmental regulation of campaign speech – at least when that regulation takes the form of disclosure requirements.

The Political Reform Act has often been challenged in the courts, in almost all instances by allegations that the Act violated the U.S. Constitution, particularly the First and Fourteenth Amendments. The touchstone for deciding such claims has always been federal court decisions on the constitutionality of similar state and federal campaign finance laws. The *McConnell* opinion is the latest in a long line of such case law, and its immediate, direct effects on the Act are relatively modest. Because *McConnell* decided the constitutional sufficiency of an innovative reform package with few parallels in California law, the impact of the majority opinion on the Act will be indirect and difficult to forecast, if indeed the Supreme Court itself does not retreat from its present position. The retirement of one justice could tip the court towards the dissenting minority, a possibility that cannot be overlooked.

Even without a shift in the balance of a polarized Supreme Court, it would be naïve to imagine that lower courts will not "re-interpret" *McConnell* in line with the views of particular state and federal judges and appellate panels. The history of Supreme Court decisions on campaign finance law abounds with instances of diverging regional interpretations of Supreme Court precedents, one example of which is the Ninth Circuit's well-known opinion in *FEC v. Furgatch*, 807 F. 2d 857 (9th Cir. 1987), which purported to follow the *Buckley* court's teaching on "express advocacy" in a statement of principles rejected by many federal courts and, most recently, by a California court of appeal in *The Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal.App.4th 449 (review den. December 11, 2002).[20]

Appellate court commentary on *McConnell* has already begun. On January 16, 2004, scarcely a month after *McConnell* was handed down, Professor Rick Hasen published a notice on his internet election law "blog," calling attention to *Anderson v. Spear*, a Sixth Circuit decision released that day, which "refined" an important element of the *McConnell* decision.[21] This opinion reviews a Kentucky law prohibiting "electioneering" (interpreted by the State Board of Elections to include a display of instructions on how to cast "write in" votes) within 500 feet of a polling place. The Sixth Circuit advised that "while the *McConnell* Court disavowed the theory that 'the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy,' it still left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest." (*Anderson, supra*, 2004 U.S. App. Lexis 584 * 36.)

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[20] The *Furgatch* "controversy" was reviewed in staff memoranda presented at the Commission meetings in March and May 2003. We may now add in postscript Justice Thomas' rueful citation to *Furgatch* in footnote 11 of his dissenting opinion, where he chides the majority for disturbing the supposed lower court consensus: "The Court, in upholding most of its provisions by concluding that the 'express advocacy' limitation derived by *Buckley* is not a constitutionally mandated line has, in one blow, overturned every Court of Appeals that has addressed this question (except, perhaps, one)." (*Id*. at 737.)

[21] *Anderson, et al. v. Spear, et al.*, 2004 U.S. App. Lexis 584 (6th Cir. January 16, 2004). Richard L. Hasen, of the Loyola Law School, operates his valuable internet resource at www.electionlawblog.org. Staff is grateful to Robert Leidigh of the Attorney General's office for providing the timely citation when this memorandum was nearing completion.

*McConnell* will be subject to much judicial "construction" over the next few years and, because the Supreme Court cannot react to every lower court interpretation, this commentary will come to affect the "meaning" of the majority opinion in ways that cannot be predicted in advance due to such variables as the makeup of individual appellate panels and the circumstances of the cases coming before them. Compounding the uncertainty of what the *McConnell* decision will ultimately come to mean is the important fact that this opinion addressed a package of federal statutes with few real parallels in the Political Reform Act,[22] and was decided on an evidentiary record that may not always be reproducible in California.

All of these factors warrant a note of caution in any preliminary assessment of how the *McConnell* decision may have altered the constitutional landscape. Nonetheless, it is worthwhile reflecting on especially notable features of the majority opinion in *McConnell* – on the reach of contribution limits, the elimination of "express advocacy" as the line at which governmental regulation of campaign speech must halt, the reassuring vitality of the "informational interest" that supports campaign disclosure laws, and the majority's liberal treatment of "coordination."

The majority's discussion of contribution limits reaffirms principles well settled since *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897 (2000). One feature of particular interest in this discussion is the majority's willingness to review expenditure limits under the more relaxed standard of review applied to contribution limits. The majority makes it clear that measures adopted to prevent circumvention of legitimate contribution limits will be evaluated under the same standard of review used to decide the sufficiency of contribution limits, at least where the government would have the right to prohibit contributions altogether. At a minimum, appalled by a record of massive evasion of vital contribution limits and disclosure requirements, the majority opinion strongly affirmed the necessity of *effective* "anti-circumvention" measures in any campaign finance regime.

Eight of nine Supreme Court justices agree that *Buckley* did *not* draw a constitutional line at "express advocacy," prohibiting regulation of campaign speech not using the "magic words" that define this term. The majority at least "assumes" in footnote 88 that there *is* a constitutionally significant distinction between "genuine" and "sham" issue advocacy, but while the majority cautions that the boundary must be clearly marked, it offers little guidance on how or where to draw the line between true and sham issue advocacy. It may not be long before we see a wave of experiments with statutes designed to regulate speech beyond "express advocacy." But with the exception of § 85310, regulation of speech under the Act is still limited to communications that contain "express advocacy." The term is defined at regulation 18225(b)(2), and staff does not

[22] Section 85310, a novel disclosure provision introduced by Proposition 34, has clear affinities to the FECA's "electioneering communications" disclosure provisions. Because it requires disclosure relating to expenditures on certain election-eve communications referring to "clearly identified candidates," regardless of whether or not the communications contain "express advocacy," section 85310 *might* have been vulnerable to constitutional challenge prior to *McConnell*, on the ground that it burdened "issue advocacy." Such a claim will now be far more difficult to sustain. But on the whole, there are few similarities between the provisions at issue in *McConnell* and statutes or regulations overseen by the Commission.

anticipate any need to amend that definition in light of *McConnell*.[23]

Both the majority and dissenting opinions emphasize the importance of the state interest in an informed electorate, an interest which amply justifies the FECA's disclosure provisions. The court splits only on whether disclosure provisions fostering an informed electorate should be all, or just part, of a campaign finance program. There is relatively little case law discussing the interests that support campaign disclosure rules, since broad challenges to campaign disclosure laws are seldom prosecuted. The *McConnell* opinions will make it more difficult for opponents of disclosure to dismiss the governmental interest in an informed electorate.

BCRA's extension of longstanding coordination provisions to political party committees also generated lengthy discussion of issues seldom explored in prior case law. The majority's approval of these measures is founded on its understanding that certain close relationships, like the association typically found between party committees and party candidates, foster an environment where collaboration will flourish even in the absence of formal "agreements" to cooperate in particular activities. The majority thus recognizes the presumptively common phenomenon of agreements framed only by "a wink and a nod" (*Id*. at 705) which create serious proof problems for agencies seeking to enforce coordination rules. The extent to which coordination can be presumed from relationships is likely to become a topic of discussion no less vexed than the effort to craft a workable distinction between "sham" and "genuine" issue advocacy. In these two areas, the *McConnell* majority may have left more questions than answers to state agencies charged with regulating the same areas under different statutory regimes.

Finally, the FECA does not purport to regulate ballot measures because federal elections do not include them, and *McConnell* therefore does not discuss ballot measures directly. But many of the points made by the *McConnell* majority relative to permissible restrictions on candidates, coordination with candidates and other persons, the strong governmental interest in an informed electorate, and the legitimate extension of governmental regulation into areas of so-called "issue advocacy" *all* have implications for the regulation of ballot measure campaigns and candidate-controlled ballot measure committees in California. Ballot measure campaigns are currently viewed under the Act as a form of "issue advocacy" insulated by the Constitution from many of the requirements imposed on other committees. Particularly when ballot measure committees are associated with or controlled by candidates, *McConnell* suggests that they can be treated very much like other kinds of committees.

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[23] When discussing possible amendments to the express advocacy definition in the aftermath of the *Davis* opinion last year, staff suggested that there was no need for an amendment at that time, but that it would be wise to consider the question again after *McConnell* was decided, since it seemed likely that the Supreme Court would have to confront the questions that had grown up around "express advocacy." As it turns out, the Supreme Court acted *not* by redefining express advocacy, but by shifting the problem into the area of "issue advocacy." The Commission's definition of "express advocacy" remains consistent with governing law.